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A REVIEW OF THE VIRGINIA RATE CASES.

In view of the widespread interest which has centered in what are commonly known as the two-cent rate cases, a brief review of the origin and progress of the litigation seems not out of place, and may tend to a clearer understanding of the true import of the various decisions which have been rendered in these cases.

The act known as the Churchman or rate act, which received the Governor's signature March 15, 1906, in brief, provided:

(1) That the State Corporation Commission should prescribe a schedule of passenger rates for all transportation companies;

(2) That until such rates were prescribed by the Commission, all steam transportation companies should keep on hand, at all times, and at every station, mileage books of five hundred miles or over, which should be sold at a maximum rate of two cents per mile, valid for use of any member of the family of the purchaser, the unused portion of the books to be redeemable.

Several if not all the steam railroads of the state failed to place on sale the mileage books as required by the statute; thereupon, the Attorney General, on behalf of the Commonwealth, instituted proceedings before the Corporation Commission against the Atlantic Coast Line Railroad to compel it to comply with the requirements of the act.

The two principal grounds of defense relied on by the railroad company were:

(1) That the act in question violated the fourteenth amendment of the Constitution of the United States;

(2) That under the Constitution of Virginia, the General Assembly had no authority to prescribe transportation rates, as such power was conferred exclusively on the Corporation Commission.

Contrary to a belief which seems to prevail even among well-posted lawyers, the Commission declined to express any opinion on the second point raised, but in an elaborate and well-supported opinion held that the complaint should be dismissed solely on the

ground that the act was void because in contravention of the provisions of the fourteenth amendment of the federal Constitution; that the requirements that mileage in five hundred mile blocks should be sold for two cents a mile, while a smaller mileage could be sold at a greater rate—a discrimination in favor of the wholesale buyer—was class legislation, and offended against the constitutional inhibition that any person should be denied the equal protection of the laws.

From this decision, an appeal was taken by the state to the Supreme Court of Virginia, and on the 22d day of November, 1906, that court, in a very able and exhaustive opinion, in which the subject of rate legislation was thoroughly reviewed, affirmed the decision of the Corporation Commission, on precisely the same ground as that taken by the Commission. In fact, it adopted the written opinion of the Commission as part of its own.

The Supreme Court, as did the Commission, carefully refrained from any expression of opinion as to the constitutional right of the General Assembly to fix railroad rates, but placed its decision solely on the ground that the act discriminated in favor of those buying five hundred miles or more of transportation against those purchasing less. There is nothing in the opinion of either tribunal to warrant the inference that either would have declared the act void had it applied to the sale of all mileage within the state, regardless of amount. *Com.* v. *Atlantic, etc., R. Co.,* 106 Va. 61, 53 S. E. 572.

July 31, 1906, the Commission, by publication, had summoned all of the steam railroads doing business in the state to appear on the first day of November, 1906, at which time the Commission would consider the propriety of establishing a two-cent rate. Certain railroads appeared by counsel, and offered the most elaborate evidence in opposition to the proposed order. Finally, after a hearing extending over nearly six months, the railroads having announced that they had nothing further to offer, the Commission on the 27th day of April, 1907, entered an order, prescribing a maximum of two cents a mile for most of the roads, and provided that the new schedule should become operative July 1, 1907.

It will be observed that the provisions of this order differed from those of the Churchman act in two very important par-

ticulars: (1) It applied to all mileage within the state; and (2) it applied only to mileage within the state.

From this order, none of the companies affected by it appealed to the Supreme Court of Virginia, as they had a right to do, and as the Supreme Court of the United States afterwards said they ought to have done if they desired to contest it. But May 15, 1907, six of the railroads, the Chesapeake & Ohio, the Norfolk & Western, the Louisville & Nashville, the Atlantic Coast Line, the Southern and the Chesapeake & Western; applied to Judge Jeter C. Pritchard of the Circuit Court of the United States for the Eastern District of Virginia, for an injunction, restraining the execution of this order on the ground that it was confiscatory and deprived the petitioning companies of their property without due process of law in violation of the fourteenth amendment of the federal Constitution.

The state appeared by her counsel, Attorney General Anderson, and without defending the constitutionality of the order complained of, put in the plea that inasmuch as the State Corporation Commission was a court, the federal court was denied jurisdiction to enjoin its proceedings by an act of Congress which forbids federal courts to enjoin proceedings of a state court (except in bankruptcy proceedings). The sole issue was whether or not the Commission was a state court within the meaning of the act of Congress.

Judge Pritchard ruled that in fixing transportation rates, the Corporation Commission is not a court, and therefore a federal court is not without authority to enjoin its proceedings and to inquire into their validity. No issue of fact being made, all of the allegations of the bills were taken as true, and the injunctions were granted.

No question was raised except the jurisdiction of the court, and without introducing evidence to show the reasonableness of the rate, the state appealed from this decision; and November 30, 1908, the Supreme Court of the United States, by a divided court, sustained Judge Pritchard's ruling as to the right of a federal court to enjoin the proceedings of the Corporation Commission, but further held that the injunction suit in the Circuit Court was premature, and for that reason alone reversed the decree of the Circuit Court.

The opinion of the majority of the court, which was far from satisfactory either to the state or to the railroads, held that the State Corporation Commission is a constitutional body, clothed with judicial, legislative and executive functions; that in hearing evidence and fixing rates, even where the transportation companies to be affected are summoned and heard both as to the law and the facts, it discharges legislative and not judicial functions, and therefore its proceedings in such behalf may be enjoined by a federal court; that the Supreme Court of Virginia in hearing and deciding appeals from the orders of the Commission in such cases is not a court but a legislature, and therefore its proceedings on such appeal may be enjoined by an inferior federal court.

Then followed the most remarkable part of the decision. Having sustained Judge Pritchard's ruling as to the character of the Commission and the right of the federal court to enjoin its proceedings, the court further held that while the Circuit Court had the power and the right to entertain the injunction suit, yet considerations of comity and propriety required that the Supreme Court of Virginia, sitting as a legislature, should first have the opportunity of passing on the order of the Commission by way of appeal, and for that reason held that Judge Pritchard's decree should be reversed. The court further held that if the Supreme Court of Virginia should sustain the action of the Corporation Commission, Judge Pritchard would then have the right to enjoin the proceedings of the Supreme Court of Virginia. But if the Supreme Court of Virginia should hold that the railroads had delayed beyond the time fixed by statute for praying an appeal, then in that event, the decision of Judge Pritchard should stand affirmed. *Prentice* v. *Atlantic, etc., R. Co.;* 14 Va. Law Reg. 676.

For the first time, perhaps, in the annals of English and American jurisprudence was the startling doctrine announced that a litigant may profit by his own delay and neglect.

Just what principle of comity and propriety is vindicated by holding it better to require an inferior federal court to enjoin the proceedings of the Supreme Court of Virginia, rather than those of the Corporation Commission, is not altogether clear.

This decision is much involved and confusing, even to the attorneys in the case, and has been much commented on by lay

journals as well as law journals. Possibly it was anticipation of some such decision that prompted the observation of a distinguished Virginia statesman of national fame, now dead, to the effect that complete justice will never be done until an appeal is allowed from the Supreme Court of the United States to a justice of the peace of Virginia.

Should the views of the Court be adopted by the Virginia state courts, and followed to their logical conclusion, many confusing and embarrassing results might follow. If the Supreme Court of Virginia, upon an appeal from an order of the Commission fixing rates, should reverse the Commission, such action on the part of the Supreme Court, according to this decision, would be legislative and not judicial, and therefore not res adjudicata, and could be attacked collaterally, any where, at any time. The Commission, as a court, in a prosecution before it for a violation of this order of the Supreme Court, would not be bound by such order, and might, if it saw proper, declare it unconstitutional.

Clearly, such a situation was never contemplated by the framers of the Virginia Constitution; and yet, under this ruling, there seems to be no more reason why the Commission, sitting as a court, may not declare the legislative act of the Supreme Court unconstitutional than it may declare a legislative act of the General Assembly unconstitutional (*Atlantic Coast Line Ry.* v. *Commonwealth,* 106 Va. 61).

Or a state inferior court might enjoin the enforcement of this order of the Supreme Court on the same ground, and certainly with as much propriety as an inferior federal court can do so. In fact, there is no end to the possibilities which may flow from this decision.

Judge Brewer dissented, because he thought Judge Pritchard should be affirmed. He did not think the railroads should be required to appeal first to the Supreme Court of the state.

Chief Justice Fuller and Judge Harlan, in vigorous and well-considered opinions, dissented from the conclusions and reasoning of the majority. These two judges held that the State Corporation Commission, in fixing rates, is a court, and that the Supreme Court of Virginia in hearing appeals from its orders is a court, and that the proceedings of neither can be lawfully enjoined by any federal court. The remedy of the railroads, if

aggrieved by the entry of an unconstitutional order, as pointed out by Judge Harlan, is by writ of error (appeal) directly from the Supreme Court of Virginia to the Supreme Court of the United States. Such a course would certainly be more compatible with the dignity of the highest state court, and would give rise to none of those embarrassing situations which may result from the decision of the majority of the court.

The railroads, acting on the hint given them, asked for an appeal to the Supreme Court of Virginia from the order of the Commission of April 27, 1907, but the limit of six months, within which such application for appeal is required by statute to be made, having expired, the application was refused.

After this refusal, four of the companies, who were plaintiffs in the injunction suits, and one other, the Seaboard Air Line, petitioned the Commission to increase the rates. In this petition two of the plaintiffs in the injunction suits, the Louisville & Nashville, and the Chesapeake and Western, did not join. After a full hearing, the Commission by a vote of three to two, on the 17th day of March, 1909, entered an order, increasing the rates, the minimum rate being two and a half cents a mile. At the time this article was written no appeal from this order has been made, either by the state or the companies, and it is thought that the order in the main is satisfactory to all parties in interest.

In the meantime, the injunction suits are still pending in the circuit court. Recently the Louisville & Nashville and the Chesapeake and Western applied for final decrees making the injunctions permanent. Attorney General Anderson, on the part of the state, opposed the motion, and asked that the state be allowed to file answer and to introduce evidence showing the reasonableness of the rates. These motions Judge Pritchard has under advisement, and an opinion may be handed down before this article is set in type. Meanwhile the two-cent rate applies to the companies which have not petitioned the Commission for an increase.

When the original injunctions were granted, the court required the companies to execute large bonds, the conditions of which were that the companies should make good any loss sustained by reason of the injunctions—should they eventually lose. Each ticket sold was accompanied by a conditional rebate, which en-

titled the holder to a refund equal to the difference between the price paid and the schedule price fixed by the Commission, provided the state finally prevailed. Shortly after, however, the railroads agreed to sell tickets at the rate fixed by the Commission until the matter was litigated to a final hearing, provided certain drastic measures which were threatened were not enforced. This agreement, so far, has been observed. But before this, thousands of these conditional rebates had been issued, and just now the purchasers, or such of them as preserved the coupons, are wondering whether anything is coming to them.

The statement recently made in certain journals that should the circuit court make permanent the injunctions in the suits now pending in it the right of the Commission to fix rates would be absolutely destroyed is unfounded. Equally erroneous is the claim that should the railroads dismiss these suits it would place the entire matter in the hands of the Commission, without the possibility of interference by a federal court.

Should the injunction be made permanent, it would merely prevent the enforcement of a two-cent rate, and would not prevent the adoption and enforcement of another schedule, which was not confiscatory. On the other hand, if these suits are dismissed, the railroads still have the right to enjoin any other schedule which is confiscatory. Each case must stand on its own particular merits. A certain rate might be sustained as to one road, and enjoined as to another.

In connection with the history of this litigation and some of the novel conclusions reached by the courts during its progress, it is interesting to note the marked change of attitude of the state and federal courts towards each other within the last hundred years.

The first case to be appealed from the Supreme Court of Virginia to the Supreme Court of the United States was in 1809, and the latter court, with Chief Justice John Marshall presiding, reversed the state court, and remanded the case for further proceedings. The Supreme Court of Virginia, after hearing argument on the point for six days by the most brilliant lawyers of that day, unanimously decided that it was not bound by this decision of the Supreme Court of the United States, and that obedience to its mandate be declined. Upon an appeal from this

decision, the Supreme Court of the United States, without passing on the delicate question whether it had the right to mandamus the Virginia Supreme Court to obey the mandate, and issue execution, decided that it had the right to issue execution itself, and so the incident closed.

The story of this highly litigated case which played battledoor and shuttlecock between these two tribunals of the highest dignity and character for more than twenty years forms one of the most interesting chapters in the judicial history of the state.

It has long been settled that the state courts are bound by the decisions of the federal courts in such cases as may be appealed to such federal courts. But in the trial of a case which cannot be taken to a federal court, the state courts are not bound by the decisions of the federal courts. True, great respect is paid to the decisions of the Supreme Court of the United States, as well as to the decisions of the supreme courts of other states, but for the most part such decisions are persuasive only and not binding on the state courts. On the other hand, in the trial of Virginia cases, the Supreme Court of the United States usually pays great deference to the decisions of the Supreme Court of Virginia, although by no means bound by them. Occasionally, the Supreme Court of Virginia, in the trial of a case which involves no federal question, finds itself compelled to dissent from conclusions reached by the Supreme Court of the United States.

The thoughtful student of the judicial history of this country is wholly unable to concur in the fears of those who find in the latest decision in the rate cases ground for apprehending any clash between federal and state authority. Each court, while jealous of its own rights and dignity, seems more willing than ever before that the prerogatives of other tribunals shall not be encroached upon.

Since the above was written, Judge Pritchard has entered final orders perpetuating the injunctions in the suits of the Louisville & Nashville and the Chesapeake & Western Railroads. But as above suggested, it is not conceived that these injunctions can affect any other rate which the Commission may establish in a proper proceeding.

Manassas, Va. ROBT. A. HUTCHISON.